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IN THE

Supreme Court of the United States

October Term, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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August 26, 1966

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Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York dated June 2, 1966.

Opinions Below

The final order of the Court of Appeals of the State of New York affirmed, without opinion, an order of the New York Supreme Court, Appellate Division, First Department, entered on November 23, 1965, affirming, on the opinion below, a final judgment of the New York Supreme Court, Trial Term, for plaintiff, entered on March 18, 1965. Said final order of the Court of Appeals of the State of New York also affirmed, without opinion, a prior order of the New York Supreme Court, Appellate Division, First Department, entered on April 30, 1964, affirming, on the opinion below, an order of the New York Supreme Court, New York County, Special Term, entered on September 16, 1963, granting plaintiff's motion to strike defendants' sixth affirmative defense. The opinion of Special Term is reported at 42 Misc. 2d 939 and at 249 N. Y. S. 2d 481, and is set forth as Appendix A hereto at page 1a. The opinion of Trial Term on damages is reported at 48 Misc. 2d 397 and at 265 N. Y. S. 2d 76, and is set forth as Appendix B hereto at page 8a. This petition is concerned with the opinion of Special Term of September 5, 1963 striking the sixth affirmative defense (A55; Appendix A hereto, page 1a), as affirmed by the final order of the Court of Appeals dated June 2, 1966 (Appendix E hereto, page 53a).

Jurisdiction

The final order of the Court of Appeals of the State of New York was rendered on June 2, 1966 and was entered in the New York County Clerk's office on June 9, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

Question Presented

May a state court award a money judgment for breach of contract in the face of an affirmative defense alleging that the contract is unenforceable because it imposes a tie-in arrangement on defendants that is illegal *per se* under Section 1 of the Sherman Act, where (a) the state court has not adjudicated the illegality of the contract under the Sherman Act; (b) enforcement of the contract would carry out the tie-in and require defendants to pay damages for refusing to take unwanted products; (c) defendants have not received title, use or benefit of any of the products for which payment is sought; and (d) a U. S. District Court had previously held in an action between the same parties that the same allegations set forth a *per se* violation of the Sherman Act?

Statute and Constitutional Provision Involved

The question just stated raises two distinct federal issues. The first arises under Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282; 15 U. S. C. §1. The pertinent portion of Section 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

The second federal issue put by the above question arises under Article VI, Clause 2, of the U. S. Constitution,

the Supremacy Clause, which provides in pertinent part as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statement of the Case

The stricken affirmative defense alleged in substance that petitioner insurance companies (hereinafter "Kemper") were coerced by respondent (hereinafter "ABC") into buying television advertising time on 35 television stations in undesired markets as a condition of acquiring sponsorship rights on the ABC program "Evening Report" and commercial television time on 95 stations in desired markets. In short, the defense attacks the tying together by the network of television stations on the network line-up so as to require an advertiser to buy all or none.

The contract that is the subject of this law suit was dated August 15, 1962. It provided for sole sponsorship by Kemper of the 15 minute television news program, "Evening Report", over 130 specified stations affiliated with ABC one day per week, on alternate Wednesdays and Fridays, for the 26 quarter-hour telecasts commencing October 17, 1962 and ending April 12, 1963 (Complaint, Ex. A. ¶¶1-2, A13-A14; Appendix F hereto, pages 59a-

60a).* On November 13, 1962, after 4 of the 26 telecasts had been broadcast under Kemper sponsorship, Kemper cancelled its sponsorship of the remaining 22 telecasts of "Evening Report," containing 55 commercial minutes, scheduled for the period from November 14, 1962 to April 12, 1963 (A380-A381; Appendix B hereto, pages 8a-9a).

This action was instituted by ABC on January 9, 1963. ABC sought damages for each of the 55 cancelled minutes, i.e., for the unperformed portion of the contract.** (A9-A12; Appendix F hereto, pages 56a-58a).

The sixth affirmative defense in Kemper's answer alleges in substance that the contract in suit is *per se* illegal as a tie-in violation of the Sherman Act (Answer ¶¶76-79, A41-A42; Appendix G hereto, page 88a). Specifically, it alleges that: (1) in 1962, the geographical pattern of Kemper's sale of insurance was such that it was desirable for Kemper to advertise by television in 95 specified market areas but not in 35 additional and different market areas served by television stations affiliated with ABC (Answer ¶¶53, 73, 75; A30-A31, A40-A41; Appendix G hereto, pages 76a-77a, 86a-88a); (2) ABC refused to permit Kemper to sponsor "Evening Report" or to advertise over the 95 desired stations unless Kemper also sponsored "Evening Report" over the 35 undesired stations (Answer ¶75, A40-A41, Appendix G hereto, pages 87a-88a); (3) the tie-in was

* Kemper used the printed appendix system on appeal to the New York Court of Appeals. References to that appendix contain the prefix "A" (e.g. A13-A14). Pages in the Appendices to this petition contain the suffix "a" (e.g. pages 59a-60a).

** Only the second cause of action is involved here. In its first cause of action ABC sought recovery for a single segment of the performed portion of the contract.

accomplished by requiring Kemper to pay a non-cost-justified penalty rate for the 95 stations that far exceeded the rate at which ABC offered the 130 station line-up which, of course, included the 95 stations (Answer ¶75, A40-A41; Appendix G hereto, pages 87a-88a); and (4) ABC was able to impose this tie-in by means of the control it had over its affiliated television stations and by means of its control over the sponsorship rights to the "Evening Report" program (Answer ¶¶69, 70, 74; A38-A40; Appendix G hereto, pages 84a-86a).

The contract itself lists the entire 130 stations consisting of the 35 unwanted stations and the 95 wanted stations and designates the market areas in which they are located (A22-A25; Appendix F hereto, pages 68a-71a). The unwanted market areas are specified in Exhibit B to the answer (A48; Appendix G hereto, page 93a).

Simultaneously with the service of this answer Kemper instituted in the United States District Court for the Southern District of New York a suit against ABC alleging that the contract upon which ABC had premised this state court suit was illegal as a *per se* violation of Section 1 of the Sherman Act. The allegations of the complaint in the federal suit were practically identical to the allegations of the sixth affirmative defense of the answer in this suit.

Thereafter ABC moved to dismiss the complaint in the federal suit on the ground of failure to state a claim. On August 14, 1963 the District Court denied ABC's motion (*American Manufacturers Mutual Insurance Co.* v. *Amer-*

ican Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848 [S. D. N. Y. 1963]; Appendix C hereto, page 27a). In its opinion the District Court reviewed the applicable authorities, including *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), and concluded that Kemper had alleged a violation of Section 1 of the Sherman Act and that this violation came within the *per se* rule recognized in *Northern Pacific*. It held:

(a) that "[t]hirty-five undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program." (p. 850; Appendix C hereto, page 29a);

(b) that the program, "Evening Report," is of a sufficiently unique nature to satisfy the requirement of a sufficiency of economic power over the tying product prescribed in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958) (p. 850; Appendix C hereto, page 31a);

(c) that proof that ABC tied the clearance of its "Evening Report" program over its affiliates to acceptance by those affiliates of the sponsor provided by ABC was also material under *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), to show that ABC had the requisite economic power in the tying product (the commercial time of the 95 desired stations) to impose the tie-in (p. 851; Appendix C hereto, page 31a); and

> (d) that, if ABC made the program over 95 desired stations available only at a disproportionately high price, this would be the equivalent of conditioning the sale of the tying product to purchase of the tied product, and would be a violation of the Sherman Act (p. 851; Appendix C hereto, p. 31a).

Less than a month after the District Court's decision, the New York Supreme Court, Special Term, by opinion dated September 5, 1963, struck from Kemper's answer the allegations sustained by the District Court as alleging a *per se* violation of Section 1 of the Sherman Act (42 Misc. 2d 939; A7; Appendix A hereto, page 1a). The state court's decision did not mention or refer to the District Court's decision. The antitrust defense was stricken without adjudicating its merits, on the ground that there was a remedy, which it did not specify, available in the federal court. Special Term's opinion stated:

> "To grant plaintiff the judgment it asks with respect to the second cause of action would indeed require defendants to pay for broadcasts over some 35 stations which defendants say they do not want and which they say they were compelled to contract for as part of an illegal tying-in program by plaintiff." (A57; Appendix A hereto, pages 3a-4a)

The opinion then stated:

> "to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only * * *." (A58; Appendix A hereto, page 5a)

Special Term also stated that in the federal court Kemper "if entitled to it, can get full relief" and noted that Kem-

per was seeking in the federal court a permanent injunction against prosecution of the state court action (A59; Appendix A hereto, page 5a). The order of Special Term was affirmed on appeal to the Appellate Division by order entered April 30, 1964 (20 A. D. 2d 890; A403; Appendix E hereto, page 44a).

Thereafter a trial was held on the issues raised by ABC's claim for $432,693.22. After trial, damages were assessed at $265,047.21 and judgment entered accordingly (48 Misc. 2d 397; A380; A65; Appendix B hereto and Appendix E hereto, pages 8a, 46a). This judgment was affirmed on November 23, 1965 on a second appeal to the Appellate Division (24 A. D. 2d 851; A401; Appendix E hereto, page 49a).

By order entered February 3, 1966 the Appellate Division unanimously granted leave to appeal to the Court of Appeals (A399; Appendix E hereto, page 51a). Under New York Civil Practice Law and Rules §5501(a), as construed in *DeLong Corp.* v. *Morrison-Knudson Co.*, 14 N. Y. 2d 346, 347 (1964), the appeal from the Appellate Division order of November 23, 1965 brought up for review the prior order striking the sixth affirmative defense and the Appellate Division order of April 30, 1964 affirming said order. On June 2, 1966 the New York Court of Appeals affirmed, without opinion, the order of affirmance of the Appellate Division, and the prior orders upon which the final judgment was based (Appendix E hereto, page 53a).

On August 1, 1966 Mr. Justice Harlan, in a three page opinion, granted Kemper's application for a stay of execu-

tion of ABC's judgment. On August 3rd a stay order was signed pursuant to the opinion of August 1, 1966 (Appendix D hereto, page 35a).

The action in the fedreal court has been diligently prosecuted by Kemper and has been assigned to District Judge Charles E. Tenney for all purposes, pursuant to Rule 2 of the Rules of the United States District Court for the Southern District of New York.

Reasons for Granting the Writ

1

The Decision Below is Not in Accord with Prior Decisions of This Court, is in Conflict with *Associated Press* v. *Taft-Ingalls Corporation*, 340 F.2d 753 (6th Cir. 1965), *Cert. Denied* 382 U. S. 820 (1965), and Enforces a Contract Embodying a *Per Se* Tie-In Violation of the Sherman Act, Which Entails Serious Anti-Competitive Consequences for Television Advertisers and Television Stations in Dealing with Television Networks.

First: The alleged tie-in is a per se violation of Section 1 of the Sherman Act.

The decisions of this Court in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), and *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), establish that the tying agreements are *per se* violations of the Sherman Act. The requisite elements of an illegal tie-in were laid down in *Northern Pacific*: (a) a sufficiency of economic power in the market for the tying product;

(b) a difference between the tying and tied products; (c) a conditioning of the sale of the tying product on purchase of the tied product; and (d) a not insubstantial amount of commerce involved. *Loew's* established that (a) the requirement for a sufficiency of economic power may be satisfied by the unique character of the tying product and (b) the conditioning or tie-in could be effected by a non-cost-justified price differential. We submit that a most cursory reading of the sixth affirmative defense shows that all four elements of an illegal tie-in are, as the District Court has determined, sufficiently expressed (sufficiency of economic power ¶¶69, 70, 71, 74, 75; not insubstantial amount of commerce ¶¶10, 11, 52-55, 70-79; product difference ¶¶53, 71, 73, 75, Exhibits A and B; conditioning ¶75; see Appendix G hereto, pages 72a-96a).

That the alleged network practice of tying all the stations together on a network line-up falls within the proscription of *Loew's* and *Northern Pacific* has been expressly recognized by informed antitrust commentators. In a statement before the Senate Interstate and Foreign Commerce Committee, Professor (now Assistant Attorney General) Turner dealt with the "must-buy" practice, under which the network requires an advertiser to purchase broadcast time on a designated line-up of stations as a condition for obtaining broadcast time on any stations. He stated:

> "[T]he 'must-buy' arrangements * * * foreclose independent TV stations from access to programs, and again foreclose small advertisers from an opportunity to purchase prime television time. Again we would conclude that, even apart from the movie cases—I

mean just on general antitrust principles—this would be clearly an unreasonable restraint of trade.

"We believe that under the movie cases these practices would be unreasonable per se; as I said, no question of business justification would come in." (*Television Inquiry,* Hearings Before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2nd Sess. [1956], at p. 1559)

Professor Schwartz, in an article in the University of Pennsylvania Law Review, said:

"Moreover, the 'must buy' practice clearly seems to come within the broad proscription of 'tying arrangements' recently enunciated by the Supreme Court in *Northern Pac. Ry.* v. *United States.*" (Schwartz, *Antitrust and The FCC: The Problem of Network Dominance,* 107 U.Pa.L.Rev. 753, 779 [1959])

In 1958 a House Commerce Committee Report described the "must buy" practice in the following terms:

"A network employing the 'must buy' practice imposes the requirement that the advertiser take a 'second commodity' (one or more unwanted basic stations) in order to obtain the wanted 'tying' product (those network affiliates in markets desired by the advertiser). Since the 'must buy' practice does require the advertiser to purchase all of the basic stations in order to gain access to the network, those stations basic or optional, wanted by the advertiser, constitute the dominant 'tying' product under the Northern Pacific rationale. * * * This practice would thus seem to fit squarely within the Northern Pacific 'tie-in' formula." (*Network Broadcasting,* Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. 1297, 85th Cong., 2d Sess. [1958], at p. 512)

The decision of the District Court of August 14, 1963 in Kemper's federal court suit is but the logical and inevitable consequence of applying the rules and principles laid down in *Northern Pacific* and *Loew's*. The opinion of informed commentators that "must buy" violates Section 1 of the Sherman Act is confirmed by an analysis of the anti-competitive consequences of the practice.

Second: The serious anti-competitive consequences to television advertisers and to television stations of the tie-in alleged in the sixth affirmative defense.

A brief summary of the anti-competitive consequences of the practice described in Kemper's affirmative defense demonstrates the truth of this Court's observation: "Tying agreements serve hardly any purpose beyond the suppression of competition" (*Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306 [1949]).

It has been more recently noted in Blake and Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 Yale L. J. 1339, 1349 (1965), that network tie-ins may "distort or impair competition in the markets for the products involved."

(a) The first and most obvious restraint resulting from the alleged tie-in is to coerce the buyer into buying what he does not want in order to get what he does want. This self-evident consequence was recognized in a memorandum submitted by Professor Turner at the 1956 hearings before the Senate Commerce Committee, which reads:

> "[U]nder the networks' coercive must-buy policy, the major advertiser must buy the time of network af-

filiates both in markets in which the advertiser is not interested and in markets where the advertiser would prefer a non-network station." (*Television Inquiry*, Hearings before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. [1956] at p. 1538.)

(b) The buyer's only alternative to a coerced tie-in purchase is not to buy at all. The choice to buy all or none poses a serious dilemma, particularly for the regional advertiser. If he buys none, he foregoes the choicest television time in favor of his competitor. If he buys all he is forced to advertise where he does not sell. The result, either way, is to place him at a disadvantage with his national competitor. That this is not an abstraction but a very real problem in the most contemporary sense is shown by the current hearings before the Senate Antitrust and Monopoly Subcommittee on TV Advertising Discrimination.

For example, the advertising manager of Hudepohl Brewing Company of Cincinnati, Ohio, stated before the Senate Subcommittee on May 26, 1966 that the ABC network refused to sell Hudepohl the desired regional network and instead offered a different line-up which included four markets in which Hudepohl had no distribution. He also stated that the practices of the networks "tend to eliminate smaller regional breweries as advertisers. By continually putting the smaller regional breweries at an opportunity and dollar buying disadvantage and awarding this advertising advantage to larger breweries, the networks discriminate and will eventually cause the downfall of smaller regional advertisers." (This testimony is reported in part in BNA, Antitrust & Trade Reg. Rep. No. 255 [May 31, 1966], at p. A-3.)

The Federal Trade Commission has recognized the competitive advantages which large national advertisers have over their smaller regional competitors in acquiring prime commercial time from television networks. (*The Procter & Gamble Co.* [Docket No. 6901], 3 Trade Reg. Rep. [1963-1965 Transfer Binder], ¶16673 [FTC 1963]). The FTC concluded that this advantage created an incentive toward conglomerate mergers that could not be justified by economies of operation. The FTC decision was reversed on other grounds (*Procter & Gamble Company* v. *FTC,* 358 F. 2d 74 [6th Cir. 1966], *cert. granted,* 35 U. S. L. Week 3044 [U. S. July 19, 1966]).

A recent study of the anti-competitive effects of network tying arrangements and price discrimination has noted the high degree to which network advertising is concentrated among a few large advertisers. The study pointed out that although some $2,062,000,000 was spent in 1963 on television programs and commercials, three-quarters of all television network advertising revenue was derived from the top 50 advertisers (Blake & Blum, *Network Television Rate Practises: A Case Study in the Failure of Social Control of Price Discrimination,* 74 Yale L. J. 1339, 1345-1346 [1965]). The Antitrust Subcommitte of the House Committee on the Judiciary stated in 1957:

> "Advertiser acceptance of the requirement ["must buy"] in these circumstances means in sum that the network has used its network position as a lever to require the advertiser to take not only stations that he wants but also stations that he does not want. In these circumstances, only very large national advertisers are willing to use network television as a commercial medium, as evidenced by that fact that about 50 per

cent of the dollar volume of all network time sales is controlled by 25 concerns." (*The Television Industry*, H.R. Rep. 607, Report of Antitrust Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. [1957], at p. 86)

(c) The impact of the "must buy" practice is not limited to the regional advertiser. The local advertiser who wishes to buy time connected with a network program over a local affiliate may be foreclosed from dealing directly with the affiliate and as a practical matter from buying the time at all. Where the network appropriates the time of an affiliate and sells it to an advertiser as part of the network lineup, that time is of course no longer available to the affiliate for sale to the local advertiser (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). In those instances where the local advertiser wishes to advertise on an affiliate not wanted by the network advertiser but coercively purchased by the latter, the result is that the time is applied to an unwanted and unneeded use instead of to a needed and wanted use.

(d) The restrictive impact of the network's "must buy" or tie-in practice extends to the network's affiliates. In every case where the network appropriates the affiliate's time to fulfill a "must buy" contract with an advertiser, the affiliate is foreclosed from selling that time directly (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). Not only does this remove the affiliate from the local advertising market but also removes the affiliate from the national spot market and to that extent limits competition between the affiliate and the network for the national or regional advertising

dollar (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). The F. C. C. has recognized that affiliates compete with networks through the national spot market and has recognized the importance of maintaining that competition (*Network Representation of Stations in National Spot Sales* [F. C. C. Dkt. No. 12746], 27 F. C. C. 697 [1959]). The Commission there forbade networks to act as agents for their affiliates in selling their time on the national spot market.

(e) Under the "must buy" practice the affiliated station may be foreclosed from selling to the regional advertiser who wants to advertise on that station but who is unwilling to take and pay for the entire network line-up, including stations in markets where he does no business. Thus, the memorandum submitted by Professor Turner at the "Television Inquiry" states:

> "By affiliating with a network company which has the must-buy policy, an affiliated station in Louisville in effect agrees that it will not carry any program, no matter how desirable, unless the sponsor or owner of the program purchases time through the network company not only on the Louisville station but on the fifty-odd other stations throughout the country included on the network's must-buy list. It is difficult to see how such a naked tie-in agreement, which would be clearly illegal in any other industry, is justified by the facts of the television broadcasting industry." (*Television Inquiry*, Hearings before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. [1956], at p. 1534)

Professor Turner also noted that the "must buy" practice forecloses competition from the independent stations

located in the same market areas as the unwanted stations. Thus the Turner memorandum states:

> "[T]he network companies illegally compel advertisers to purchase time on a must-buy list that includes both strong and weak stations, to the detriment of the independent stations competing with the weaker network stations, and of advertisers who cannot afford to pay for such a large package." (*id.* p. 1521)

The Antitrust Subcommittee of the House Judiciary Committee has reported:

> "Another effect of 'must buy' is to place the independent station at a distinct competitive disadvantage vis-a-vis the network affiliate operating in the same market." (*The Television Industry,* H. R. Rep. 607, Report of Antitrust Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. [1957], at p. 86)

Third: Under the decisions of this Court, the ABC-Kemper contract should not be enforced.

We submit that the illegality of the alleged tie-in is clear, and its anti-competitive consequences to television advertisers and stations are of serious moment. We come now to the impact of the tie-in arrangement on the enforceability of the contract of August 15, 1962, which obligated Kemper to sponsor "Evening Report" over the 35 unwanted stations together with the 95 wanted stations.

The contract lists both the wanted and the unwanted stations and requires Kemper to pay for both. It is the contract which perfects the tie-in of the 35 unwanted stations to the 95 wanted stations. It is the contract which

carries out the tie-in, and consummates the other anti-competitive consequences enumerated above. It is only through enforcement of the contract that ABC can reap the fruits of its coercion. Thus the restraint is not collateral to, or separable from, the contract, but inheres in the contract. Kemper's answer expressly alleges the anti-competitive consequences that would flow from enforcement of the contract (¶¶79, 81, 82; A42-A43; Appendix G hereto, pages 88a-89a).

This contract is, we submit, a classic example of the type that the courts have refused to enforce. It has long been established that illegal agreements will not be enforced. This policy had its origin in the earliest period of the common law (*Anonymous-"Dyer's" Case,* Y. B. 2 Hen. V, f. 5, pl. 26 [1415]). This Court has expressly recognized this policy in *McMullen* v. *Hoffman,* 174 U. S. 639 (1899), at p. 654:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards *carrying out* the terms of an illegal contract." (Emphasis added.)

The declaration in Section 1 of the Sherman Act that "[e]very contract * * * in restraint of trade * * * is declared to be illegal" was a reaffirmation of this policy that unlawful contracts in restraint of trade should not be enforced. *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 279-291 (6th Cir. 1898), mod., 175 U. S. 211 (1899).

Numerous decisions of this Court have reaffirmed that basic policy.

In *Continental Wall Paper Co.* v. *Louis Voight & Sons,* 212 U. S. 227 (1909), this Court refused to enforce a contract for the agreed price of goods sold and delivered where the sales account "was made up * * * with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized." This Court thus distinguished *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540 (1902), holding simply that the illegal organization of plaintiff did not itself render its contracts unenforceable. For other cases holding agreements unenforceable because of antitrust illegality, see *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373 (1911); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8 (1918); *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346 (1922); *Sola Electric Co.* v. *Jefferson Co.,* 317 U. S. 173 (1942); *Katzinger* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Co.,* 329 U. S. 402 (1947).

In *Kelly* v. *Kosuga,* 358 U. S. 516 (1959), this Court held that an oral conspiracy to raise prices by withholding onions from the futures market was separable from a completed sale of 50 carloads of onions and therefore did not render the promise to pay the agreed price for the sold onions unenforceable. Nevertheless this Court recognized *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.,* 212 U. S. 227 (1909), as the "leading case", where judgment for the plaintiff had been denied because such a judgment would "make the courts a party to the *carrying out* of one of the very restraints forbidden by the Sherman Act." (Emphasis added.) This Court went on to state the test of unenforceability as follows:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" (358 U. S. at 520)

The rationale of the defense of illegality under the antitrust laws was given as follows in *Continental Wall Paper Co.* v. *Louis Voight & Sons,* 212 U. S. 227 (1909), at p. 262:

> "In such cases the aid of the Court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

Here enforcement of the contract would carry out the illegal tie-in, would give the wrongdoer the fruits of its coercive policy, would sanction the serious anti-competitive consequences, not only to Kemper but to others in the industry, and would fly in the face of the strong federal policy reflected in Section 1 of the Sherman Act. The remedy of unenforceability will effectively vindicate not only Kemper's rights but will also protect against the anti-competitive consequences to others. It is noteworthy that the only federal case involving the effect of a tie-in arrangement on the enforceability of a contract has held the contract to be unenforceable (*Associated Press* v. *Taft-Ingalls Corporation,* 340 F. 2d 753 [6th Cir. 1965], *cert. denied* 382 U. S. 820 [1965]). Moreover here recognition of Kemper's antitrust defense would not result in Kemper's acquiring "other people's property for nothing." The only issue here relates to Kemper's liability for the 55 commercial

minutes following cancellation on November 13, i.e., the unperformed portion of the contract.

The decision below is squarely at variance in several particulars with the rules articulated in the many decisions of this Court cited above. (1) It is clear that the illegality need not appear "on the face" of the contract for the contract to be unenforceable. In neither *Continental Wall Paper Co.* nor *Associated Press* did the illegality appear on the face of the contract. In *Sola Electric Co., Katzinger* and *MacGregor,* the illegality turned on the extrinsic fact that the patent was invalid. (2) The consequence of inherent illegality is unenforceability (see cases cited p. 20 *supra*), not the necessarily metaphysical "proportionment" of the penalty to the wrong, as proposed by the court below (A58; Appendix A hereto, page 4a). (3) The notion that a state court need not enforce federal law is, to say the least, novel. But more as to this below. (4) The court's reliance on *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743 (1947) is misplaced. That was a suit by a manufacturer on promissory notes given by a buyer for the balance owed for cans sold and delivered, in which defendant buyer asserted that the manufacturer had engaged in price discrimination against it in violation of the Robinson-Patman Act, 15 U. S. C. §13. Two distinctions between this and the instant case are thus immediately apparent. (a) The defendant in *Bruce's Juices* was seeking to avoid payment for what it had already received, whereas in the instant case ABC is seeking to recover for post-cancellation programs that were not broadcast under Kemper sponsorship. This precise distinction is the "overriding general policy"

by which this Court has stated the courts are to be guided (*Kelly* v. *Kosuga*, 358 U. S. 516, 520-521 [1959]). (b) In *Bruce's Juices* illegality was not under the Sherman Act, but under the Robinson-Patman Act. This Court therefore noted that the illegality could not inhere in the contract because it took at least two separate transactions to constitute a price-discrimination violation under that Act. This Court also noted that "the entire basis for judging under the two Acts [Sherman Act and Robinson-Patman Act] is different" (330 U. S. at 755-756).

Fourth: The decision below is in conflict with* Associated Press *v.* Taft-Ingalls Corporation, *340 F.2d 753 (6th Cir. 1965), cert. denied 382 U. S. 820 (1965).

Review by the Supreme Court is necessary in order to resolve the conflict between the decision of the New York Court of Appeals rejecting the antitrust defense to a tie-in contract claim and the decision of the Court of Appeals for the Sixth Circuit in *Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965), upholding the antitrust defense to a tie-in contract claim.

In the *Associated Press* case the Associated Press had brought suit for payment due under a contract for the furnishing of four separate wire news services to a newspaper owned by defendant Taft-Ingalls. The contract required two years' notice of cancellation. The newspaper had contracted for the four wire services in 1948 at a single package price for all four wires. In 1957 Taft-Ingalls, in an effort to reduce costs, asked that its newspaper be

furnished only one of the four wire services. The Associated Press refused this request and insisted that the paper could obtain the desired wire only by taking the entire package of four wires at the package price. In 1958 the newspaper cancelled the contract without giving the required two years' notice. Associated Press sued for the agreed contract price for the four wires for the unexpired two-year period. Taft-Ingalls defended the suit on the ground that the Associated Press had made its four wire services available only as a single package, a *per se* tie-in violation of the Sherman Act. The court upheld the defense on appeal, in reliance on this Court's decision in *Kelly* v. *Kosuga,* 358 U. S. 516 (1959), on the ground that to give judgment on a tie-in contract would be to "carry out" and enforce the very restraint made illegal by Section 1 of the Sherman Act.

These cases are virtually indistinguishable. Both involve contracts to furnish interstate communications services, or rights relating thereto, over a period of time. In both cases the plaintiff seeks to recover for the period after defendant has cancelled the contract. In neither case does the illegality appear "on the face" of the contract. In both cases the extrinsic fact had to be established that the unwanted products were in fact unwanted. In both cases the defense was asserted that the contract is a tie-in violation of the Sherman Act. Although the decision of the New York Court of Appeals was rendered after the decision and opinion in *Associated Press,* that court did not attempt to reconcile its decision with that of the Sixth Circuit. It is apparent that they are irreconcilable, and that the conflict should now be resolved by this Court.

2

Under the Supremacy Clause the State Court was Not Free to Reject the Defense of Illegality and Proceed to Judgment Prior to an Adjudication of the Antitrust issues.

The New York courts have proceeded to judgment in the face of and without awaiting adjudication of the issues raised by Kemper's defense of antitrust illegality. The antitrust defense has been stricken on the ground that "enforcement of the Federal antitrust laws should in general be the Federal courts only" and on the ground that in the federal court Kemper "if entitled to it, can get full relief" (A58-A59; Appendix A hereto, p. 5a). The state courts also stated that there was an advantage in not litigating the antitrust issues in two courts (A59; Appendix A hereto, p. 5a).

It is, of course, clear that the enforceability of a contract alleged to be in violation of the Sherman Act is a matter of federal law. Thus, in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959) this Court said at p. 519:

> "[T]he effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176, 177 • • • ."

See also *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88 (1902).

Any state policy against recognition of the defense of antitrust illegality must, of course, give way to the federal policy against enforcement of contracts in restraint of trade. Thus, this Court stated in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) at p. 176:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its bene-

> fits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. * * * [T]he doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. * * * [Citing authority] When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. *To the federal statute and policy, conflicting state law and policy must yield. Constitution Art. VI, cl. 2*; * * *." (Emphasis added.)

It has long been established by this Court that a state court may not refuse to adjudicate federal issues. Thus, this Court said in *Claflin* v. *Houseman,* 93 U. S. 130 (1876), at p. 137, that a state court:

> "* * * is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Subsequently, in *Mondou* v. *New York, New Haven & Hartford R. R. Co.,* 223 U. S. 1 (1912) (Second Employers' Liability Cases) this Court held that a state court

must enforce a federal right even though that right is not in accord with the policy of the state and even though it might be inconvenient and confusing for the state court to apply federal law. See also *Testa* v. *Katt*, 330 U. S. 386 (1947) and *McKnett* v. *St. Louis & San Francisco Ry.*, 292 U. S. 230 (1934).

The reasoning of these decisions, that state courts may not refuse to adjudicate federal issues, applies as well where the federal law is raised in defense as where it creates the cause of action. Thus, Professor Loss has stated in Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249, 1255 (1960):

> "[A] state court's refusing to entertain a *defense* of federal illegality is a graver error than its refusing to accept jurisdiction which is given it over federal *claims*." (Emphasis in the original.)

See also Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 507 (1954).

In *Anderson* v. *Carkins*, 135 U. S. 483 (1890), the Nebraska court, in an action for specific performance of a contract to sell land, had stricken an affirmative defense that the contract was illegal and unenforceable because in violation of the federal homestead laws. This Court reversed and held that the state court must recognize the defense of illegality under the federal statutes despite the existence of state policies and statutes favoring enforcement of the contract.

We submit that the course pursued by the state courts in this case is squarely at odds with these authoritative decisions.

Moreover, the reasons given by the state court for failing to adjudicate the federal issue here are without substance. It is entirely immaterial that Kemper does or does not have a complete remedy in some other court, since the reason for refusing to enforce illegal contracts is that they are against public policy (*Continental Wall Paper Co.* v. *Louis Voight and Sons,* 212 U. S. 227, 262 [1909]). This consideration is particularly significant here where the anti-competitive impact of the tie-in arrangement is not limited to Kemper alone.

Even if we should accept, arguendo, the reasoning in the state court decision, it does not lead to the conclusion there reached, *viz.*, that the state court should proceed to judgment before the antitrust issue is resolved. At most, the reasoning of the state court leads to the conclusion that a federal court is a better forum for the adjudication of the antitrust defense. But clearly it does not follow from this that the state court can proceed to judgment before the antitrust issue is decided. It could have awaited disposition by the federal court and thus eliminated any question of duplicatory litigation. *General Aniline and Film Corp.* v. *Bayer Co.*, 305 N. Y. 479, 485 (1953). Under the express holdings of this Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942); *Mondou* v. *New York, New Haven & Hartford R.R. Co.*, 223 U. S. 1 (1912) (Second Employers' Liability Cases); and *Anderson* v. *Carkins,* 135 U. S. 483 (1890), any inconsistent state rule must give way to the federal policy against enforcement of contracts made in violation of Section 1 of the Sherman Act. The action of the courts below effectively stifled without adjudicating the federal right

asserted in the antitrust defense. The course pursued is in plain disregard of the constitutional mandate that "the judges in every state shall be bound" by the laws of the United States.

Conclusion

For the foregoing reasons: (1) the decision of the court below is not in accord with the prior decisions of this Court, (2) the decision below is in conflict with the decision in *Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965), (3) the tie-in practices alleged in Kemper's sixth affirmative defense have serious anti-competitive effects upon regional advertisers, local advertisers, and on affiliated television stations, (4) the sufficiency of Kemper's defense of illegality under the antitrust laws presents an important federal question relating to the enforcement of the antitrust laws, and (5) the action of the state court in proceeding to judgment without adjudicating the federal issue presented by the sixth affirmative defense raises important federal questions as to the proper function of state courts under the Supremacy Clause.

Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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